MILWAUKEE COUNTY POLICY – FEDERAL AND STATE FMLA LAWS

Revised July 1, 2009

The Wisconsin Family and Medical Leave Law went into effect April 26, 1988. The Federal Family and Medical Leave Act went into effect August 5, 1993. The **purpose** of the laws is to provide unpaid leave to eligible employees for specific reasons and to protect those employees' jobs and certain benefits while on leave. Substitution of paid leave may be allowed (state law) or required (federal law). The purpose of this policy is to comply with the federal and state FMLA laws. New/amended federal FMLA regulations effective January 16, 2009 are referenced throughout this Policy, e.g., 29 C.F.R. 825.100 – 825.800)

1. HOW TO DETERMINE IF AN EMPLOYEE IS ELIGIBLE FOR FMLA:

Federal

An employee must have worked 1,250 hours over previous 12 months from date leave begins (including overtime worked, no paid or unpaid leave time). An employee need not re-qualify each time more intermittent leave is needed in the same calendar year (January-December).

An employee must have been employed by the County for 12 months prior to date leave begins (need not be consecutive). Separate periods of employment will be counted, provided that a break in service does not exceed seven years. Separate periods of employment will be counted if the break in service exceeds seven years due to National Guard or reserve military service obligations or when there is a written agreement including a collective bargaining agreement stating the employer's intention to rehire the employee after the service break (29 CFR 825.100(b)(1))

State

An employee must have been paid for 1,000 hours (including working, vacation, sick allowance, personal, and holiday hours) within 52 weeks prior to request.

An employee must be employed for 52 consecutive weeks, including layoff (need not be immediately prior to date of request).

2. WHAT AMOUNT OF FMLA TIME OFF IS AN EMPLOYEE ENTITLED TO:

Federal (January-December calendar year, one exception)	**State** (January-December calendar year)
Total of 12 weeks (40 hours or 20 hours):	**Total of 10 weeks (40 hours or 20 hours):**
within 12 months of birth or placement of a child for adoption or foster care and to care for the newborn, adopted, or foster child.	6 weeks for birth or adoption-not foster care beginning within 16 weeks of birth or placement of child for adoption or precondition to adoption
within a calendar year for an employee who is unable to work because of a serious heath condition or for a covered family member who has a serious health condition ("**SHC**").	2 weeks for an employee who is unable to work because of a serious health condition ("**SHC**")
within a calendar year of Qualifying Exigency Military Family Leave. This provision is available to eligible employees who need to take leave due to "any qualifying exigency" that arises because the employee has an eligible family member who is called to active duty or is on active duty status in support of a military contingency operation. (29 CFR 825.126)	2 weeks to care for the employee's child, spouse or parent who has a SHC
Total of 26 weeks of Military Caregiver Leave (also known as the Covered Service Member Leave) within a single 12-month period beginning on the first day of FMLA leave. This provision is available to an employee who is the spouse, child, parent, or next of kin (near blood relative excluding, spouse, child, parent) of a covered service member to care for the service member's serious injury or illness. (29 CFR 825.127)	

Marital status is irrelevant when there is a birth or adoption.

Under the federal FMLA, an employee may take all 12 weeks for one purpose in one calendar year (January through December).
Under the state FMLA, an employee may not take all 10 weeks for one purpose in one calendar year (January through December).

Under the federal FMLA, if spouses are employees of the County, the combined total amount of leave they may take is limited to a total of 12 weeks for birth, adoption, foster care, or to care for sick parents.

Employees are entitled to take federal FMLA leave for birth or adoption or placement of a child for foster care within one year after the birth, adoption, or foster care placement.

Under state FMLA, leave to care for a newborn child or for a newly placed child for purposes of adoption must commence within 16 weeks before or after the birth or placement of a child for purposes of adoption. If two births or two adoptions occur in the same calendar year, under state FMLA law, the employee is entitled to 12 weeks of leave (6+6).

Under the federal and state FMLA, leave may be taken prior to the birth of a child or placement of a child for adoption or foster care (federal law only) if the employee's absence from work is required for the placement to proceed.

Under both federal and state law, there is no medical certification needed for a FMLA leave to care for a newborn or newly placed child (federal: adoption, foster) (state: adoption only).

Twelve weeks of FMLA leave under federal law runs concurrently with FMLA leave under state law and leave under County civil service rules, County ordinances, and union contracts. See Milwaukee County General Ordinances 17.18 general and (4) and Milwaukee County Civil Service Rule VIII, Section 3(1) and (1)(g) and sections 2.22 Sick Leave and 2.24 of the union contract between DC 48 and the County for additional benefits. **Injury pay and worker's compensation is counted against the employee's FMLA federal and state leave entitlement if the employee is qualified for FMLA leave.**

3. INTERMITTENT LEAVE (NON-CONTINUOUS INCREMENTS): FMLA leave taken in separate blocks of time due to a single qualifying reason. Efforts should be made by employees to not unduly disrupt the County's operations. Intermittent leave is scheduled.

Federal	**State**
None unless medically necessary*	Allowed if medically necessary including reduced hours – should not unduly disrupt the County's operations
If the County agrees, the employee may have intermittent or reduced leave for birth, adoption, or foster care placement	Partial absence leave due to birth or adoption allowed (should not unduly disrupt the County's operations)
An employee does not have to establish eligibility with each leave/absence in the same calendar year.	

*For planned medical treatment, the employee taking FMLA leave must make a reasonable effort to schedule treatment so as to not unduly disrupt the operations of the County. Advance notice and schedule of leave dates and times are required, schedule should be sufficiently definite.

Examples: medical appointments, chemotherapy, full-time to part-time during period of recovery need medical certification indicating the necessity of intermittent leave or reduced leave schedule due to serious health condition.

A request for intermittent leave or a reduced leave schedule due to a SHC does not require the County's agreement. Included are those times scheduled for planned medical treatment and recovery from treatment for a SHC. This includes part time or reduced work schedules. The shortest increment allowed in other situations must be allowed for time off under the FMLAs. The County may assign an employee to another position that might better allow for intermittent leave. The County may transfer a DC 48 employee temporarily to an alternative job with equivalent pay and benefits that accommodates recurring periods of FMLA intermittent leave better than the employee's regular position.

Medical certification indicating the necessity of intermittent leave or reduced work schedule leave due to a SHC is needed. Intermittent/reduced schedule leave may be taken when medically necessary to care for a seriously ill family member or because of the employee's SHC.

4. WHO ARE COVERED FAMILY MEMBERS

Federal	**State**
Parent: biological, adoptive, in loco parentis to employee (Need no legal or biological relationship) (No in-laws)	Parent: natural, foster, adoptive, step, legal guardian (includes in-laws) (no in loco parentis)
Child: Biological, adopted, foster, step, legal ward, child of a person standing in loco parentis under 18 or over 18 and "incapable of self care*" because of a mental or physical disability**	Child: natural, adopted, foster, step, legal ward under 18 or over 18 and is unable to care for him/herself because of a SHC
Spouse: legal husband or wife, common law spouse if recognized	Spouse: legal husband or wife, common law spouse if recognized

*Incapable of self care: requires active assistance or supervision to provide daily self care, unable to perform three or more activities of daily living: bathing, dressing, cooking, eating, shopping, paying bills, using phones, taking public transportation.

**Mental or physical disability: physical or mental impairment that substantially limits one or more of an individual's major life activities (walking, speaking, breathing, seeing, hearing, caring for oneself, working, etc.).

5. DEFINITIONS

Health care provider ("HCP")under Wisconsin FMLA includes: nurse, chiropractor, physical therapist, certified occupational therapist, dentist, physician, physician's assistant, podiatrist, occupational therapist, occupational therapy assistant, respiratory care practitioner, dietitian, optometrist, pharmacist, acupuncturist, psychologist, social worker, marriage and family therapist or professional counselor, speech-language pathologist, audiologist, massage therapist, bodyworker, and Christian Science Practitioner.

Health care provider ("HCP")under federal FMLA includes: podiatrist, nurse practitioner, midwives, Christian Science Practitioner, optometrist, psychologist, physician's assistant, physical therapist, physician, clinical psychologist, chiropractor, clinical social worker. (29C.F.R. §825.125(b)(2))

A SHC under Wisconsin FML is defined as a disabling physical or mental illness, injury, impairment or condition involving either (1) in-patient care in a hospital, nursing home, or hospice or (2) outpatient care that requires continuing treatment or supervision by a health care provider (visits to a health care provider which must be direct, continuous and firsthand). Disabling = incapacitation or inability to pursue an occupation due to physical or mental impairment if employed; if individual is not employed, a SHC is a physical or mental impairment that interferes with normal daily functions.

A SHC under the federal FMLA, is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care in a hospital plus any period of incapacity or subsequent treatment in connection with inpatient care, or

- Continuing treatment (29 C.F.R. 825.115) by a HCP which includes a period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition that also involves: treatment two or more times within 30 days of the first day of incapacity by a HCP, nurse, physical therapist, or other HCP referred to by the HCP, by a nurse under direct supervision of a HCP, or by a provider of health care services under orders of, or on referral by a HCP; or treatment by a HCP on at least one occasion which results in a regimen of continuing treatment under the supervision of a HCP. The employee is required to visit a HCP at least twice within 30 days of the first day of incapacity unless

there are extenuating circumstances. The first (or only) visit to the HCP must occur within 7 days of the first day of incapacity, or

- Periods of incapacity due to pregnancy (must be unable to perform essential functions), need not be more than three consecutive calendar days (29 C.F.R. 825.120), or

- A chronic condition requires periodic visits (at least twice a year) to a HCP for treatment by a HCP or by a nurse under direct supervision of a HCP. A chronic condition continues over an extended period of time (including recurring episodes of a single underlying condition); and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy). (29 C.F.R. §825.115(c)), or

- There may be permanent or long-term conditions for which treatment may not be effective. The employee or family member must be under continuing supervision but need not be receiving active treatment by a HCP (e.g., Alzheimer's, severe stroke, or the terminal stages of a disease. (29 C.F.R. §825.115(d)), or

- Conditions that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). (29 C.F.R. §825.115(e)), or

- An employee who is pregnant may be unable to report to work because of severe morning sickness. The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a SHC. (29 C.F.R. §825.115(f) and §825.120(a)(5)), or

- An employee who has asthma attacks may be advised to stay home when the pollen count exceeds a certain level. (29 C.F.R. §825.115(f)).

Seeing a HCP once with no continuing treatment is not a serious health condition. Generally, a common cold or the flu is not a serious health condition. However, if the definition of a serious health condition is met, both a cold and the flu may be a SHC.

Family leave is allowed to care for both the physical and psychological care and arrangement of third party care (nursing home, home care nurse). The employee's presence must be beneficial to the family member who has a SHC (including holding the patient's hand). The family member must be unable to carry on his/her daily life's activities (working, school, etc.) Under 29 C.F.R. 825.100(d), advance notice and a certification to the County that substantiates that the leave is due to the SHC of the employee's covered family member or a serious injury or illness of a covered service member or because of a qualifying exigency is required. Failure to comply with these requirements may result in a delay in the start of FMLA leave. See also 29 C.F.R. 126.

Medical leave is allowed under the FMLAs if the employee is unable to perform the essential functions of his/her position. An employee cannot be forced to work in a light duty position

when the employee's health care provider has not released the employee to return to work. An employee on FMLA leave may be able to work a second job even though an employee is eligible for FMLA for his/her County job. However, see MCCSR VIII Section 2 (2)(b).

Military Qualifying Exigency Family Leave under the federal FMLA: 1) short notice deployment (7 days or less); 2) attend military events or ceremonies and activities related to active duty or called to active duty; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) spend time with a military member who is on temporary rest and recuperation leave; 7) post-deployment activities; 8) additional activities not encompassed in other categories but agreed to by the employer and employee. (29 C.F.R. 825.126)

6. SUBSTITUTION OF PAID LEAVE

Federal	State
Leave: Unpaid – The County is not required to provide paid sick leave where it is not normally provided.	**Leave:** Unpaid – The employee has the sole right to substitute any kind of paid leave, including sick leave.
Substitution of Leave: Employee may request or the **County may require/force** an employee to take paid leave, **including accrued compensatory time** (29 C.F.R. 825.207(f)). An employee who is off due to a serious health condition of covered family member may take sick leave under MCCSR VIII, Section 3(1)(g) which is different than MCGO 17.18(4)	**Substitution of Leave:** Yes. Any kind of paid leave (totally the **employee's** option).

The County may not force an employee to take other paid leave if an employee or a covered family member has a serious health condition and the employee has sick leave available and the employee wants to take sick leave in accordance with civil service rules/county ordinances.

The County will not:

- Discipline an employee (including the filing of written charges for discharge) for taking time off under the FMLAs, or
- Count a FMLA leave under "No Fault" attendance policies, or
- Deny a DC 48 employee or a non-represented employee the Floating Holiday under DC 48's contract, section 2.21(8) or §17.17(4) of the ordinances, or
- Refuse to hire or promote an employee because the employee took a FMLA leave, or

- Use the taking of FMLA leave as a reason to take any adverse employment action against an employee who took a FMLA leave.

7. WHAT AN EMPLOYEE IS REQUIRED TO DO: ADVANCE NOTICE AND MEDICAL CERTIFICATION

Federal	State
When the need for a FMLA leave is foreseeable (birth, planned medical treatment, etc.), an employee must provide 30 days advance notice before a FMLA leave is to begin. If 30 days notice is not practicable, **notice must be given as soon as possible and practical – the same or next business day the employee learns of the need for FMLA leave.** When the need for FMLA leave is not foreseeable the employee must comply with Milwaukee County's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. (29 C.F.R. §825.302)	-Reasonable and practicable notice. -For emergencies, no notice is required.

Pursuant to 29 C.F.R. §825.303(b), an employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request**. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligation under FMLA.** The County requires information from an employee that indicates the SHC renders the employee unable to perform the functions of his/her job or a covered family member with a serious health condition is unable to perform his/her daily activities, or that the leave is related to a pregnancy, or the employee was hospitalized overnight. **The County is obligated to inquire if it needs additional information to determine whether the leave qualifies for FMLA protection.**

Under 29 C.F.R. 825.100(d), the employee eligible for FMLA must provide the County with advance notice and submit a medical certification to substantiate that a requested leave is medically necessary due to the employee's SHC that renders the employee unable to perform the essential functions of his/her job. FAILURE TO COMPLY WITH THESE REQUIREMENTS MAY RESULT IN A DELAY IN THE START OF FMLA LEAVE.

Medical Certification required: The employee should furnish a medical certification at the time the employee requests FMLA leave or within five business days from the date of the

request. If the FMLA leave was unforeseen, the County should receive the medical certification within five business days after the leave commences. The employee must provide the requested certification no later than 15 calendar days after requested by the County unless it is not practicable despite the employee's diligent, good faith efforts, or the County agrees to provide more than 15 calendar days to submit the certification. **The medical certification (an original, not a copy) must be submitted to the FMLA Specialist, Rebecca Parker or it must be faxed from the health care provider's office to Ms. Parker, or to another designated human resources manager, coordinator, or analyst as directed.** If the medical certification is not received 15 days after requested, the County may delay the taking of a FMLA leave or may grant leave subject to receipt of certification. If 30 days notice is not provided by the employee prior to the FMLA leave, then certification should be provided before leave begins. The County may require a second opinion. The County cannot use the same HCP on a regular basis for second opinions.

The County pays for a second opinion. The medical certification must include a date when the SHC began, probable duration of the SHC, appropriate medical facts known by the HCP, a statement that the employee cannot perform the essential functions of his/her job or the employee is needed to care for an eligible family member and date(s) of medical treatment. If necessary, because the original HCP's opinion (the employee's) and the opinion (second) of the County's designated HCP differ, the County may obtain a third opinion at the County's expense. The County and the employee must jointly approve the third HCP and this third opinion shall be final and binding. (Re-certification may be requested every 30 days for a chronic condition. However, the County may not request re-certification until after 30 days has passed from the end of the leave date previously specified in a medical certification by a HCP unless 1) the circumstances described by the previous certification have changed significantly (e.g., the severity of the condition, the duration or frequency of absences); or 2) the County receives information casting doubt upon the employee's stated reason for the absence; or 3) the employee requests a leave extension.

The County (FMLA Specialist, designated human resources manager, coordinator, or analyst, but not the employee's direct supervisor) may contact the HCP directly (29 C.F.R. 825.307(a)) for *clarification* (to understand handwriting and meaning of response) and *authentication* (County provides a copy of the certification and requests verification that the information on the form was completed and/or authorized by the HCP who signed it). The County MAY REQUEST NO ADDITIONAL INFORMATION. The County may contact the HCP directly only after the County has notified the employee that the medical certification was deficient and the employee failed to have the HCP cure the deficiency(ies) (29 C.F.R. 825.305(c)).

The County may not request medical certification for a FMLA family leave due to the birth, placement of a child for foster care (federal law only), or adoption.

8. WHAT ARE THE COUNTY'S RESPONSIBILITIES?

The County must inform the employee in writing:

1. Eligibility Notice. When an employee requests FMLA leave, or when the County acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of his/her eligibility to take FMLA leave within five business days, absent extenuating circumstances and that the leave will be counted against the employee's 12-month entitlement under the FMLAs. The County should notify an employee when FMLA eligibility is determined that a fitness for duty certification will be required before an employee will be allowed to return to work from a FMLA leave due to his/her own SHC. Such certification may be requested only regarding the particular SHC that caused the employee to need FMLA leave.

2. Medical Certification. The County should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days or, in the case of unforeseen leave, within five business days after the leave commences. The County must allow an employee 15 calendar days to submit the medical certification.

   The County shall advise an employee whenever the County finds a certification incomplete or insufficient, and shall state in writing to the employee what additional information is necessary to make the certification complete and sufficient. If the applicable entries have not been completed, are vague, ambiguous, or non-responsive the employee has seven calendar days to cure any such deficiency. Failure to comply may result in denial of FMLA leave.

   A medical certification from a health care provider should include the following information (29 C.F.R. 825.306):

   (1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;
   (2) The approximate date on which the serious health condition commenced, and its probable duration;
   (3) A statement or description of the appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or any other regimen of continuing treatment;
   (4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job, and the likely duration of such inability;
   (5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) Information sufficient to establish the medical necessity for intermittent or reduced schedule leave for **planned medical treatment** or **unforeseeable episodes of incapacity** and an estimate of the dates and duration of such treatments or duration of episodes of incapacity and any periods of recovery; and,
(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member, a statement that such leave is medically necessary to care for the family member, which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

3. Recertification.(29 C.F.R. 308) The County may request recertification no more often than every 30 days and only in connection with an absence by the employee. If the medical certification indicates that the minimum duration of the condition is more than 30 days, the County must wait until that minimum duration expires before requesting a recertification. The County may request a recertification of a medical condition every six months in connection with an absence by the employee.

   The County may request recertification in less than 30 days if:
   (1) The employee requests an extension of leave;
   (2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). If an employee has a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or
   (3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. If an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the County to request a recertification in less than 30 days.

   The employee must provide the requested **recertification** to the County within the timeframe requested by the County (which must allow at least 15 calendar days after the County's request).

   Any recertification requested by the County shall be at the employee's expense.

It is the County's right and obligation to determine whether leave is FMLA eligible. The County can force an employee to take FMLA leave.

An employee cannot collect unemployment compensation while on FMLA.

9. JOB BENEFITS AND PROTECTION (restore to the same level of benefits before the leave)

Although under the FMLAs, an employee is not entitled to the accrual of additional benefits or seniority that would have occurred during the period of leave, an employee on FMLA leave does accrue hours of service during periods of paid leave. An employee must be restored to an equivalent position with equivalent benefits, pay and other terms and conditions of employment upon return to work after a FMLA leave. An employee may not be denied health insurance upon his/her return to work. Full benefits must be immediately restored with no waiting period, exclusion of pre-existing conditions, etc. If an employee fails to pay the employee portion of health insurance coverage while on FMLA leave, and it expires, the County cannot wait until an open enrollment period to sign up the employee. The County must give 15 days notice that coverage will lapse. If notice is not provided, the County is the insurer until coverage is reinstated. The County may pay the employee portion of premiums for health insurance if the employee fails to do so. The County may then recover those employee premiums paid by the County to maintain an employee under a group health plan during a leave whether the employee returns to work or not. If the County pays the employee portion of premiums for health insurance, but the employee does not return to work at the end of the leave period for reasons other than continuation of a serious health condition or other circumstances beyond the control of the employee, **the County may recover the County's premiums paid for the employee's health insurance coverage.** Benefits continue under the same conditions that applied before a FMLA leave commenced. If the employee has a leave under the FMLAs without pay, the employee's seniority does not increase during the leave for members of TEAMCO and FNHP. For other represented and non-represented employees, seniority continues to accrue. Under the FMLAs, benefits do not continue to accrue during a leave. The County will provide benefits after an employee returns from an unpaid leave under the FMLAs which accrue during the unpaid leave pursuant to union contracts, civil service rules, and county ordinances.

10. MISCELLANEOUS

Notices (posters) stating the employee' rights under the FMLAs and the County's policies must be posted in one or more conspicuous places where employees are likely to see the posters.

11. CERIDIAN ENTRIES

Employees should continue to code their time off work as usual. Payroll clerks will adjust the codes with the appropriate FMLA designation at the direction of the FMLA Specialist.

12. RELIEF

A complaint may be filed with the state Equal Rights Division within 30 days of an alleged violation. Under the federal FMLA, a complaint may be filed with the U.S. Department of Labor ("**DOL**"). An employee may bring a civil action under federal law, which must normally be

brought within two years of the last event constituting a violation for which relief is sought. The DOL will investigate, resolve the case, or bring an action in federal court. The ERD will investigate a complaint and provide an administrative hearing. The County has 10 days to respond after receiving an ERD notice that indicates an employee has filed a complaint. The DOL may file a cause of action in federal court within two years or three years if there is a willful violation.

State remedy: leave time, reinstatement, back pay, benefits up to two years, costs, reasonable actual attorney fees. Decisions are rendered within 30 days of the filing of the complaint. An employee has 10 days to appeal to the circuit court after a hearing on the merits of the case.

Federal remedies: lost wages, overtime, salary or employment benefits actual monetary losses (e.g., cost of substitute care), prejudgment interest, possible liquidated damages (double the amount of monetary loss) but not if the DOL obtains an injunction prohibiting any further violations of the FMLA. An employee may recover reasonable attorney's fees and costs, employment, reinstatement, promotion.